BILL WEGENER

IBLA 97-387 Decided August 26, 1999

Appeal from a decision of the Lower Snake River District Office, Bureau of Land Management, rejecting proposal to purchase public lands described in application IDI-31206.

Affirmed.

1. Administrative Authority: Estoppel--Estoppel--Federal Employees and Officers: Authority to Bind Government--Federal Land Policy and Management Act of 1976: Sales--Public Sales: Generally

   Under the provisions of 43 C.F.R. §§ 2711.3-1(g), 2711.3-2(e), and 2711.3-3(d), no sale of public land is binding until BLM has accepted the tender of the purchase price. There must be a demonstration of affirmative misrepresentation or affirmative concealment of a material fact by the Government to estop the Government from denying the existence of a binding contract. The principle of estoppel does not apply if there is no evidence of a written decision or communication confirming that BLM would convey a particular parcel, and reliance on inaccurate information provided by a Federal employee does not create an adequate basis for an assertion that a right was created or bind the Government to act in a manner contrary to regulations and statutes.

2. Federal Land Policy and Management Act of 1976: Sales--Public Sales: Generally

   Under 43 U.S.C. § 1713(d) (1994) and 43 C.F.R. § 2710.0-6(c)(5), BLM must convey public lands for fair market value, and it must offer the land by competitive bidding unless the conditions set forth in 43 U.S.C. § 1713(f) (1994) and 43 C.F.R. § 2710.0-6(c)(1) are present. If the specified conditions are not met, a request for a direct sale of lands for less than fair market value is properly rejected.

APPEARANCES: Bill Wegener, Buhl, Idaho, pro se; Jerry L. Kidd, District Manager, Lower Snake River District, Bureau of Land Management, Boise, Idaho.

OPINION BY ADMINISTRATIVE JUDGE MULLEN

Bill Wegener has appealed a May 2, 1997, decision issued by the Lower Snake River (Idaho) District Office, Bureau of Land Management (BLM), rejecting his proposal to purchase public lands described in application IDI-31206.

The record indicates that in 1992 Wegener contacted BLM seeking to purchase a 40-acre tract of public land situated south of Boise, Idaho (referred to as "Parcel A" in this decision). Parcel A is in the SE¼NW¼ of sec. 5, T. 1 N., R. 2 E., Boise Meridian, and had been identified as suitable for disposal in BLM's management framework plan (MFP).

In 1993, Parcel A was included in the Hulls Gulch Land Exchange. Notice of the proposed exchange was published at 59 Fed. Reg. 22857 on May 3, 1994, and copies were sent to interested and affected parties, including Wegener. 1/ Nicholson, the exchange proponent, had agreed to a "brokered" arrangement under which he would sell Parcel A to Wegener after exchange was consummated. 2/ BLM informed Wegener of this agreement, but there is nothing in the record indicating that Wegener contacted Nicholson.

When Wegener did not acquire Parcel A, he lodged several complaints regarding what he perceived to be a conflict between what BLM had told him

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1/ The only protest of the proposed action was filed by the Owyhee County Commissioners, and that protest was subsequently withdrawn.

2/ "BLM often times has difficulty negotiating two-party land exchanges because federal regulations preclude exchanging properties where the difference in value between the public and private land exceeds 25% of the value of the public land. To address this problem, BLM has developed a method of using third-party proponents to facilitate the disposal of several low-valued public land parcels to acquire one or more high-valued private parcels. In these cases, the proponent first acquires a high-valued private parcel that BLM has designated an interest in acquiring and then exchanges it for several low-valued BLM parcels. To recover the original investment in acquiring the private land, some or all of the original BLM parcels are subsequently sold by the proponent to individuals who have previously expressed an interest in purchasing them. These 'designated buyers' usually have signed a purchase agreement with the proponent prior to completion of the exchange to ensure their ability to purchase a parcel(s) following completion of the exchange. Depending on the exchange, and subject to negotiations with the proponent, 'designated buyers' may be required to pay for a portion of the legal expenses incurred by the proponent in the facilitation of the land exchange."
(BLM Answer, dated May 29, 1997.)

and what had actually transpired. After congressional inquiries, BLM agreed to have its Boise, Idaho, District Office consider selling a tract of public land to Wegener "if he could identify another suitable parcel, and if there were no land use planning or environmental considerations that would bar the disposal." Wegener examined a list of public lands designated for disposal and notified BLM that he would like to acquire a 40-acre parcel in Ada County, Idaho, identified as the SW¼NE¼ of sec. 6, T. 1 N., R. 3 E., Boise Meridian (Tract B). This request was documented and serialized as IDI-31206. 3/

An appraisal of Tract B was completed on June 28, 1996, with the estimated market value being deemed to be $50,000. In a March 10, 1997, letter to Wegener, BLM advised him that Parcel B could only be offered under a competitive sale. The letter also explained the option of acquiring the parcel through a "brokered exchange" (see fn. 2 supra for an explanation of this process). Wegener was given 30 days to advise BLM regarding how he desired to proceed. Following a directive issued by the Office of the Director, BLM, the Lower Snake River District Office issued its decision rejecting Wegener's sale proposal on May 2, 1997.

In his statement of reasons (SOR), Wegener sets forth the following basis for appeal:

1. In the summer of 1992, we contacted John Sullivan concerning a 40 acre parcel in our neighborhood. He said that the BLM had no need for the parcel and would put it up for sale the following summer, and we would be first in line.

2. 8-24-93 BLM appraisal was completed and was "to be offered for sale to Wegener."

3. 8-25-93 John Sullivan advised that the parcel would be available in the summer of 1994 and not to worry, we "would be notified."

4. We then learned that the parcel was being traded to Nicholson.

5. 6-9-94 Dave Brunner stated in writing that "John Sullivan informed you from the outset that the BLM had no plans to sell this parcel."

Fact: BLM internal documents state that 40 acre parcel is "to be offered for sale to Jim Wegener as part of the Foothills Exchange Project."

3/ The record reflects that this parcel was subject to the Kuna MFP and within a Category III disposal zone.

6. October 1994 BLM perjured themselves during a congressional inquiry concerning the sale of this parcel, when BLM * * * stated that the BLM would not be selling any property in the area.

Fact: Page one of the BLM's own internal appraisal report dated 11-2-93 (Report #IDI-29516) says: "This appraisal report was prepared for the purpose of estimating the fair market value of the fee estate of 40 acres of Federal (BLM) lands to be offered for sale to Jim Wegener as part of the Foothills Exchange Project."

Fact: BLM Memorandum dated 3-9-93 says "proposed buyer Jim Wegener."

7. In late 1994 John Sullivan said to pick another parcel from his list (which he sent me) and he would try to work a sale to me.

8. 1-13-95 Dale Bale (BLM) said per government mandate from Assistant Secretary in Washington, he will start an archeological report now and a botanical report in the spring of 1995.

9. 2-15-96 BLM's Dale Bale wrote to me and said, "due to increased workloads, the BLM would not process the sale to me until next year."

Please note: All of these delays and substitutions were at behest of BLM.

10. 4-19-96 Dave Brunner said he had talked with Kathy Eaton in Washington and that the sale is all programmed and will have Dale Bale contact me with a definitive answer as to date of sale to me.

11. 5-31-96 Received anticipated "direct sale schedule of events to Bill Wegener"--FLPMA [Federal Land Policy and Management Act of 1976] 1-31206 and "will issue patent to me on 10-31-96."

Fact: Sale did <u>not</u> occur, and in fact the BLM did not even make contact with me until early 1997! -- Again, I was the one to contact them.

12. 1-27-97 I called BLM's Mike Pool in Washington to ask what the hold up was.

13. 1-30-97 John Sullivan said "the BLM never agreed to a sale with us, and won't do a direct sale now. Parcel would

have to be auctioned off, as this parcel does not qualify for a direct sale to me."

Fact: 5-31-96 The BLM sent me a "direct sale schedule of events."

14. 2-6-97 I informed Idaho State BLM Director Martha Hahn about BLM's failure to perform. -- Received no reply from her.

15. 3-10-97 Received notice from District manager Jerry Kidd, who said: government cutbacks coupled with the added workload prevented our completion of your case within the anticipated time frame." Also said "you were informed that we had no interest in selling the parcel because we wanted to include it in a land exchange."

Fact: Five years of the BLM's internal memos, verbal commitments and written correspondence show otherwise.

16. Now, the BLM has agreed to "allow" me to bid at auction for a substitute 40 acre parcel, but the minimum bid will be $50,000.00 as opposed to the original $16,000.00 parcel, "since land values have increased significantly in the past few years."

Fact: I am willing to accept the substitute 40 or the original parcel, but I will not be penalized $34,000.00 because as the BLM says, "Land values have increased significantly in the past few years." The BLM's failure to perform is their fault, not mine. The BLM and my family entered into a contractual agreement for $16,000.00, and we expect compliance at that figure.

Wegener urges a finding that the record demonstrates a contractual arrangement between him and BLM, both implied and actual.

In its answer to Wegener's SOR, BLM declares that "it was always BLM's intent to facilitate his acquisition of the original 40-acre parcel as a part of the third-party Foothills Exchange. There was never an intent, nor was there a defensible rationale, for BLM to make a direct sale of the parcel to Mr. Wegener." (Answer at 2.) BLM then explains that because of the apparent misunderstanding, it "went out of its way and far beyond its normal processes" to offer Wegener an opportunity to obtain another parcel, but that its regulations limited it to offering the parcel under the competitive bidding procedures. Finally, BLM asserts that Wegener lacks standing to appeal a discretionary decision issued pursuant to 43 C.F.R. § 2711.3-1(g).

[1] A decision to sell a particular tract of public land is within the discretion of BLM. See Dean M. Anderson, 94 IBLA 88, 91 (1986).

When it enacted section 203 of the Federal Land Policy and Management Act of 1976 (FLPMA), found at 43 U.S.C. § 1713 (1994), Congress authorized the sale of public land when the Secretary determines that the sale satisfies specific criteria. The intent of this provision "is not to give the Secretary unlimited powers, but to allow him the flexibility to make conveyances which are tailored to appropriate land uses." Dean M. Anderson, supra. Conveyance by sale is governed by the implementing regulations at 43 C.F.R. Part 2710. The regulation at 43 C.F.R. § 2711.3-1(f) affords BLM the discretionary authority to withdraw any tract from consideration if it finds that "[c]onsummation of the sale would be inconsistent with the provisions of any existing law." See C. Sody Soderstrom, 95 IBLA 382, 386 (1987). The regulation at 43 C.F.R. § 2711.3-1(g) specifically provides that the bidder or offeror has no contractual or other rights against the United States until (1) the acceptance of the offer and (2) payment of the purchase price. See also 43 C.F.R. §§ 2711.3-2(e), 2711.3-3(d). Until payment of the purchase price, no action taken shall create any contractual or other obligations against the United States. See Gordon L. Hardy, 106 IBLA 227, 229 (1988). Under 43 C.F.R. § 2710.0-6(c)(5), public lands cannot be sold for less than fair market value. See 43 U.S.C. § 1713(d) (1994).

Section 203(f) of FLPMA provides that public sales must be conducted by competitive bidding procedures unless

> the Secretary determines it necessary and proper in order (1) to assure equitable distribution among purchasers of lands or (2) to recognize equitable considerations or public policy, including but not limited to a preference to users, he may sell those lands with modified competitive bidding or without competitive bidding. In recognizing public policy the Secretary shall give consideration to the following potential purchasers: (1) the State in which the land is located; (2) the local government entities * * *; (3) adjoining land owners; (4) individuals; and (5) any other person.

43 U.S.C. § 1713(f) (1994); see also 43 C.F.R. § 2710.0-6(c)(1).

Direct sales may be utilized when the authorized officer determines that a competitive sale is not appropriate and the public interest would best be served by a direct sale. 43 C.F.R. § 2711.3-3(a); George Younghans, 135 IBLA 251, 254 (1998); Kenneth W. Bosley, 99 IBLA 327 (1987). The regulation at 43 C.F.R. § 2710.0-6(c)(3)(iii), which defines the policy for a direct sale of public land, provides that there may be a direct sale when (1) the lands offered for sale are completely surrounded by lands in one ownership with no public assess, (2) the lands are needed by State or local governments or nonprofit corporations, or (3) it is necessary to protect existing equities in the land or resolve inadvertent unauthorized use or occupancy of the lands.

Applying the above laws and regulations to Wegener's purchase of either parcel, we find no merit in the arguments he has presented.

We specifically find that there was never a contractual obligation to convey Parcel A to Wegener emanating from the dialogue initiated by him in 1992. Documents were prepared by BLM to explore the possibility of a conveyance directly to Wegener and a conveyance through a brokered transfer, an official decision confirming a conveyance to him was never issued. BLM never asked for payment of the purchase price and the purchase price was never tendered by Wegener. The fact that Parcel A was transferred by exchange rather than sale Wegener did not violate the laws and regulations applicable to public land management and disposition, and there was adequate and reasonable justification for BLM's actions. 4/

The facts also do not establish existence of an implied contract. There is nothing in the record that we construe to be a promise by an authorized official that BLM would convey Parcel A to Wegener. Wegener states that assurances were given him by Sullivan. The record does not support that statement. In any event, Sullivan was a resource management specialist with the Boise District Office. In 1974, Brunner, the District Manager, was the designated authorized officer who could make the determination that Parcel A could be sold to Wegener. See BLM Manual, §§ 2710.04, 2711.1. Nothing in the record evinces that Brunner suggested that BLM would sell Parcel A to Wegener. Thus, the facts do not compel a conclusion that a contract for the sale of Parcel A to Wegener was ever implied.

Wegener suggests that the information and instruction given to him by BLM employees estop BLM from denying the existence of a contract for the sale of Parcel A to him. The application of the doctrine of equitable estoppel against the United States requires a demonstration of affirmative misrepresentation or affirmative concealment of a material fact by the Government. United States v. Ruby Co., 588 F.2d 697, 703 (9th Cir. 1978); Norfolk Energy, 115 IBLA 265, 270 (1990); D. F. Colson, 63 IBLA 221, 224 (1982). This affirmative misconduct must be grounded in writing. David E. Best, 140 IBLA 234, 236 (1997); Fremont Coal Co. v. Office of Surface Mining Reclamation and Enforcement, 130 IBLA 41, 44 (1994) (oral statements by Federal employees alone are insufficient to support estoppel). The case file contains no written decision or communication stating that BLM would convey the parcel to him. The principle of estoppel does not apply. See, e.g., Rudy S. Sutlovich, 139 IBLA 79, 82 (1997); Leitmotif Mining Co., 124 IBLA 344 (1992).

Assuming, arguendo, that Wegener was misinformed by a BLM employee that the property would be conveyed to him, that misinformation cannot compel a conveyance. Reliance on inaccurate information provided by a

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4/ We find nothing in the record to justify a direct sale of Parcel A to Wegener. If it had been offered for sale rather than having been made subject to the exchange, Parcel A would have been subject to the competitive bidding process.

Federal employee cannot create a right not authorized by law. See Parker v. United States, 461 F.2d 806 (Ct. Cl. 1972); Montilla v. United States, 457 F.2d 978 (Ct. Cl. 1972); Raymond T. Duncan, 96 IBLA 352, 355 (1987). Under section 203 of FLPMA, public lands may be sold only as determined by the Secretary, and the Secretary has promulgated regulations dictating the manner of sale. To force a sale contrary to the regulations would exceed the discretionary authority delegated by Congress, thereby creating a right not authorized by law. 5/ The erroneous advice upon which reliance is predicated must be in the form of a crucial misstatement in an official decision and there is no written document containing erroneous advice in this case. See Martin Faley, 116 IBLA 398, 402 (1990), and cases cited therein.

The Secretary is directed to determine when the national interest is best served by disposal of a particular parcel of land. 43 U.S.C. § 1701 (1994). Thus, Wegener cannot claim surprise when Parcel A was included in an exchange which facilitated the Department's management of the public lands. 6/

We find no basis for holding that BLM is obligated to convey property to Wegener as a result of its not having conveyed Parcel A to him.

[2] We will now address BLM's rejection of the offer to purchase IDI-31206. BLM has no authority to sell land for less than its fair market value, and to do so would be contrary to Congressional mandate. See 43 U.S.C. § 1713(d) (1994); 43 C.F.R. § 2710.0-6(c)(5). The appraised fair market value of the land was deemed to be $50,000. Wegener has not challenged the appraisal and has not submitted any evidence that the $50,000 value placed on the land was incorrect. Further, BLM was obligated by the statute and regulations to dispose of this property by competitive bidding, and could not offer the land to him by a direct sale. See 43 U.S.C. § 1713(f) (1994); 43 C.F.R. § 2710.0-6(c)(1).

5/ In Utah Power & Light Co. v. United States, 243 U.S. 389, 408-09 (1917), the Supreme Court of the United States held: "The United States is neither bound nor estopped by acts of its officers or agents in entering into an arrangement or agreement to do or cause to be done what the law does not sanction or permit." The doctrine of estoppel is applied with much reluctance to management of the public lands and only in cases where to invoke equitable estoppel would "not interfere with the underlying Government policies or unduly undermine the correct enforcement of a particular law or regulation." United States v. Browning, 630 F.2d 694, 702 (10th Cir. 1980). Further, the employees of BLM have no authority to bind the Government when they depart from the requirements of the statutes and regulations. Jack J. Grynberg, 114 IBLA 225, 229 (1990).

6/ Parcel A was included in the lands exchanged for approximately 650 acres of high valued recreation and wildlife lands which were made a part of the Hulls Gulch Nature Preserve.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the decision appealed from is affirmed.

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R.W. Mullen
Administrative Judge

I concur:

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T. Britt Price
Administrative Judge